UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

Franklin Mascol, et al.,

Plaintiffs,
- against -

CV-03-3343 (CPS)
MEMORANDUM OPINION AND ORDER

E&L Transportation, Inc., et al.,

Defendants.

----------X

SIFTON, Senior Judge.

This is a civil action brought by six named plaintiffs in their individual capacities and on behalf of others similarly situated for claims under sections 7(a), 11(c), 15(a)(2)(5), 16 and 17 of the Fair Labor Standards Act, as amended (29 U.S.C. §§ 207(a), 211(c), 215(a)(2)(5), 216 and 217 (2004)) ("FLSA") and claims under Article 19 of the New York State Labor Law ("NYS Labor Law") and its implementing regulations, N.Y. Comp. Codes R. & Regs. tit. 12, § 142-2.2 (2004). The complaint, as amended, alleges that defendants failed to pay plaintiffs – current and former ambulette drivers – overtime pay at a rate of time and one half for hours worked over 40 hours per week in violation of FLSA and NYS Labor Law. Plaintiffs seek unpaid overtime wages from July 9, 2000 through the date of judgment, as well as liquidated

damages, pursuant to the FLSA and unpaid overtime from July 9, 1997 through the date of judgment and liquidated damages equal to 25% of the unpaid wages pursuant to state law. In addition, plaintiffs seek an injunction and declaratory relief and attorneys' fees.

On January 27, 2004, the Court dismissed plaintiffs' claims for declaratory and injunctive relief under the FLSA and granted plaintiffs' motion to permit the action to proceed as a representative action under 29 U.S.C. § 216(b) with respect to the FLSA claims. The court ordered (1) defendants to turn over the names and addresses of potential plaintiffs by March 2, 2004, (2) plaintiffs to send notice to potential class members by April 2, 2004, and (3) potential plaintiffs to return notices by May 28, 2004.

Plaintiffs, on consent, amended the complaint on March 17, 2004 to add Elbrus Transportation, Inc. ("Elbrus"),[1] Boris Shamiloff, Arkadi Ashurov, and Eduard Pardilov, as successors in interest to the original named defendants E&L Transportation, Inc., E&L Transportation, Inc. d/b/a Community Transport, Community Transportation, Inc., LCH Transportation Corp., Ely

[1] Elbrus purchased the assets of the original defendants in March of 2004.

Matalon, and Leon Krisinovsky.[2] On March 29, 2004, the Court (1) extended its January 27, 2004 order to apply to the new defendants, (2) gave the new defendants until April 1, 2004 to turn over the names and addresses of potential plaintiffs; (3) gave the plaintiffs until April 15, 2004 to send out notices; and (4) required the notices be received by June 15, 2004. On April 13, 2004, the March 29, 2004 order was again modified to (1) give defendants until April 30, 2004 to turn over the names and addresses, (2) give the plaintiffs until May 15, 2004 to send out notices; and (3) require that return notices be received by July 15, 2004.

On May 9, 2005 this Court granted plaintiffs' motion for partial summary judgment on liability under the FLSA and NYS Labor Law. On June 7, 2005, defendants filed a Notice of Appeal to this decision.[3]

---

[2] The complaint names Leon Krisinovsky. The correct spelling would appear to be Kryzhanovsky.

[3] Although the filing of a notice of appeal generally divests jurisdiction from the district court and confers jurisdiction upon the courts of appeals, pursuant to 28 U.S.C. § 1291, "the jurisdiction of the federal courts of appeals is limited to appeals from final decisions of the district courts." *Savino et al. v. Computer Credit, Inc.*, 173 F.R.D. 346, 350 (E.D.N.Y. 1997)(citing *United States v. Rogers*, 101 F.3d 247, 251 (2d Cir. 1996)). However, divestiture of jurisdiction is not a per se rule but "a judicially crafted rule rooted in the interest of judicial economy". *Rogers*, 101 F.3d at 251,

Where, as here, a party appeals from an interlocutory order that does not expressly direct judgment pursuant to F.R.C.P. 54(b), nor authorize an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), "such an appeal does not deprive [this Court] of the power to

Plaintiffs now move for class certification pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure ("FRCP") with respect to their New York State ("NYS") Labor Law claim. Plaintiffs also seek to waive, on behalf of the putative state law class, any claim for liquidated damages.[4] In addition, plaintiffs request that Tyrone Ladson be joined to the FLSA action despite his untimely opt-in notice.

For the reasons set forth below, the motion for class certification is granted for a class of ambulette drivers not paid overtime wages, who worked for defendants at any time during the six years preceding the commencement of this action to the present who expressly waive any claim to any liquidated damages

---

proceed." *Hoffenberg v. United States*, 2004 U.S. Dist. LEXIS 20668, * 6 (S.D.N.Y. October 18, 2004)(citing *Leonhard v. United States*, 633 F.2d 599, 610 (2d Cir. 1980)(internal citations omitted)(finding "no efficiency to be gained by allowing a party to halt the district court proceedings by filing a plainly unauthorized notice"); *See also Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 742 (1976); *Rogers*, 101 F.3d at 251; *Savino*, 173 F.R.D. at 351.

Accordingly, this Court finds that it has jurisdiction to decide the motions presently before it, notwithstanding defendant's notice of appeal. *See Savino*, 173 F.R.D. at 350-351; *See also Weisman v. Darneille*, 79 F.R.D. 389, 391 (S.D.N.Y. 1978)("Where a notice of appeal refers to an order which is clearly non-appealable, the mere taking of the appeal is insufficient to divest the district court of jurisdiction. In such circumstance, the district court may ignore the notice of appeal and may proceed with the case.").

[4] NYS Law forbids class actions for liquidated damages unless a class action is authorized by the statute giving rise to the cause of action. N.Y. C.P.L.R. § 901(b) (2004). The NYS Labor Law in question here does not do so. N.Y. Lab. Law § 663 (2002).

under NYS Labor Law § 663.[5] Plaintiffs are ordered to give notice to putative class members pursuant to FRCP 23(c)(2)(B), including a clear and concise explanation of the nature of any potential liquidated damages claim under the NYS Labor Law § 663, and the implications of the waiver of such damage claim. Finally, plaintiffs' request to join Tyrone Ladson to the FLSA action despite his untimely opt-in notice is granted.

Background

The following facts are drawn from the complaint and the papers submitted with this motion and are undisputed unless otherwise noted.

Plaintiffs' motion for class certification under FRCP 23(a) and (b)(3)[6] for their NYS Labor Law claim describes the class they seek to represent as:

> former and present ambulette drivers and helpers that were employed by the Defendants during the six (6) years preceding the filing of the Complaint through the present, and who regularly worked over forty (40) hours a week for the Defendant, but who were not paid overtime pay at a rate of time and one-half as required by FLSA, Section 7 (29 U.S.C. § 207) and Article 19 of the NYS Labor Law.

---

[5] A six year statute of limitations applies to plaintiffs' labor law claims. NYS Labor Law § 663(3).

[6] Plaintiffs mistakenly state that they seek certification pursuant to FRCP 23(g), which governs appointment of class counsel. The mistake is made repeatedly in their papers. (*E.g.* Pls. Mem. Supp. Mot. Partial Summ. J. at 2.)

(Pls. Mem. Supp. Mot. Partial Summ. J. at 2-3.) Plaintiffs' counsel, Barry I. Levy and Elan R. Kandel, have over the last five years handled numerous labor litigation cases in the Southern and Eastern District of New York. (Decl. of Barry I. Levy ¶ 3.)

Despite this experience, plaintiffs' counsel fail to identify clearly the class they seek to certify. Plaintiffs include "helpers" in their description of the plaintiff class quoted above, but only refer to "ambulette drivers" in their discussion of whether plaintiffs meet the requirements of FRCP 23(a) and (b)(3).[7] Defendants maintain that the plaintiffs should not be allowed to certify a class that includes helpers and mechanics because of the differences in their contractual terms of employment.[8] (*See* Defs.' Aff. Opp'n Pls. Mot. for Summ.

[7] *See* Pls. Mem. Supp. Mot. Partial Summ. J at 9 ("based upon a review of the Defendants' payroll records, the putative class consists of at least 90 present and former ambulette drivers"); *id* at 14 ("This action is based solely upon the Defendants' policy of requiring their present and former employees (ambulette drivers) to work overtime hours without proper compensation"). Named plaintiff Franklin Mascol, who is a ambulette driver, has declared that the only difference between himself "and other potential class members is the hours they worked and their salaries." (Decl. of Franklin Mascol ¶ 10.)

[8] Defendants state that under a Collective Bargaining Agreement ("CBA") negotiated with the International Brotherhood of Teamsters Local 531, a newly hired ambulette driver was hired to work a salaried sixty hour week that broke down to $6.43 an hour for the first forty hours of work and then overtime pay at $9.64 an hour for the next twenty hours of work. (Defs.' Aff. Opp'n ¶ 34.) Plaintiffs dispute that any overtime was included in the weekly salary of the drivers. (Pls. Mem. Further Supp. at 23.) Defendants maintain that helpers were members of Local 531 but were not assigned 60 hour work weeks and

J. and in Supp. of Defs.' Notice of Cross Mot. for Dismissal, hereinafter "Defs.' Aff. Opp'n", ¶¶ 153-63.) In response, plaintiffs assert in a footnote that they are not "seeking to represent helpers and mechanics employed by the Defendants relative to either Plaintiffs' FLSA claims or proposed New York State Labor Law class action claims." (Pls.' Mem. Further Supp. Mot. Partial Summ. J., hereinafter "Pls.' Mem. Further Supp.", at 2 n.1.) Nevertheless, the payroll accounting report ("Ennis Report") submitted by the plaintiffs to demonstrate the potential numerosity of the putative class includes eight helpers and one mechanic. (*See* Defs.' Aff. Opp'n ¶¶ 153-63; Decl. of Barry I. Levy, Exhibit A at 1-64, hereinafter "Ennis Report".)

The Ennis Report is sixty-four pages long, gives no job description to accompany the listed names, and includes much redundancy. Eliminating eight helpers and one mechanic from the list, fifty-four ambulette drivers are listed in the report. (*See* Ennis Report at 1-64.) This number includes the six named plaintiffs and all the ambulette drivers who opted in with respect to the FLSA claim.[9]

---

were paid over time for all work over 40 hours. (Defs.' Aff. Opp'n ¶¶ 47-48.)

[9] Plaintiffs and Defendants differ in their totals of the number of FLSA opt-in notices filed with the Court. The correct number of FLSA ambulette driver plaintiffs who opted in is twenty-seven, inclusive of the named plaintiffs. A survey of the attachments to the ECF Docket reveals thirty FLSA opt-in notices. (*See attachments to* ECF Docket at

Discussion

This Court has jurisdiction over the pendent NYS Labor Law claim under 28 U.S.C. § 1367(a).

Class Certification

District Courts have considerable discretion with respect to class certification. *See Califano v. Yamasaki*, 442 U.S. 682, 703 (1979); *Woe by Woe v. Cuomo*, 729 F.2d 96, 107 (2d Cir. 1984) ("It is often proper . . . for a district court to view a class action liberally in the early stages of litigation"). The Court of Appeals will only overturn a class certification for abuse of discretion and gives FRCP 23 a liberal construction. *Marisol v. Giuliani*, 126 F.3d 372, 375, 377 (2d Cir. 1997). When considering a motion for class certification, a court should accept the allegations of the complaint as true, avoid an inquiry into the merits, and may consider material beyond the pleadings. *Monaco v. Stone*, 187 F.R.D. 50, 59 (E.D.N.Y. 1999); *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 85 (S.D.N.Y. 2001) (granting class certification on pendent NYS Labor Law claim for low wage workers allegedly not

38, 40-44.) Two of the notices currently attached to ECF Docket # 42 are mistakenly duplicative of two of the attached entries to ECF Docket #40. Notice from Jeffrey Ferguson and Clifford Jean Pierre should be attached instead. (*See* Letter from Kandel to Judge Sifton of 10/26/2004 at 2). Defendants allege that two of these opt-in plaintiffs were helpers and one a dispatcher. (Defs.' Aff. Opp'n ¶¶ 231-32.) Subtracting these three non-ambulette drivers, the Court arrives at the figure of twenty-seven opt-in FLSA ambulette drivers.

paid overtime).

Plaintiffs bear the burden of proof on a motion for class certification under FRCP 23. *Monaco*, 187 F.R.D. at 59. First, Plaintiffs must demonstrate that under FRCP 23(a) the putative class has: (1) sufficient numerosity to make individual joinder impracticable; (2) commonality of questions of law or fact; (3) typicality of claims and; (4) representatives who fairly and adequately protect the interests of the class. (FRCP 23(a).) Second, because Plaintiffs move for class certification under FRCP 23(b)(3), they must show that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

Numerosity

Plaintiffs satisfy the numerosity requirement of FRCP 23(a)(1). The numerosity of a class is a gauge of the impracticability of individual joinder of all the potential class members but is not necessarily dispositive of the impracticability of joinder. *See* 7A Charles Alan Wright et al., *Federal Practice and Procedure* § 1762 (1986) (collecting cases with a wide range of class certifications and denials based on

varying numerosity). In the Second Circuit a class of forty presumptively meets the numerosity requirement. *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Only some evidence is required to demonstrate the numerosity of a putative class, and this evidence need not be exact in number but merely needs to consist of a reasonable class estimate. *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993).

In the present case, the Ennis Report submitted by Plaintiffs reveals that there are approximately fifty-four ambulette drivers who are potential class members. The defendants confuse the issue in asserting that because there are only twenty-seven members of the FLSA collective action, the putative class for the NYS Labor Law claim is not so numerous as to render individual joinder impracticable. (*E.g.*, Defs.' Reply Mem. Supp. Defs.' Cross Mot. Dismiss and in Further Opp'n to Pls.' Mot. Partial Summ. J. and Class Certification, hereinafter "Defs.' Reply Mem. Further Opp'n", at 7-9.) The issue is not how many collective action members there are under the FLSA claim, but what is a reasonable estimate of the putative class size for the NYS Labor Law claim. While defendants challenge the accuracy of the damages analysis in the Ennis Report, about which the Court expresses no opinion here, they do not challenge the number of ambulette drivers listed in the report beyond pointing out

that there are nine persons listed in the Ennis Report who are not ambulette drivers. The Court has subtracted these nine from its total of ambulette drivers listed in the Ennis Report. (*Id.*) The Court finds the resulting number of fifty-four potential NYS Labor Law claim class members to be a reasonable, albeit inexact, estimate of the size of the putative class. Because of this, the Defendants' alternative request for a delay in class certification to allow for further discovery as to the size of the putative class is denied. (*See, e.g.*, *id.* at 1.)

The presumption based solely on a head count, however, needs to be considered in light of the totality of the circumstances of the particular case, because impracticability of joinder is not just a matter of numbers. *Robidoux* 987 F.2d at 936 (citing *Demarco v. Edens*, 390 F.2d 836, 845 (2d. Cir. 1968)). Relevant factors include: judicial economy; the geographical dispersion of class members; the financial resources of class members and their ability to bring suit individually; and "requests for prospective injunctive relief which would involve future class members." *Id.*

Judicial economy favors class certification in this case. There is no reason to think that the number of opt outs is likely to be substantial. Hence, the preclusive effect of a class action will avoid future duplicative litigation and

preserve judicial resources both on the federal and state level.

Although the putative class members are not geographically dispersed, this factor is counter-balanced by practical considerations concerning the ability and willingness of putative class members to file suit individually. The amounts in controversy are not large when taken singly, and it may be not worthwhile for an individual plaintiff to pursue litigation over any allegedly unpaid overtime pay since filing and attorney fees could easily exceed any recovery. A class action consolidates all the plaintiffs' claims and thereby lowers the overall cost of litigation for the putative class members through the efficiency resulting from shared counsel.

Finally, because prospective injunctive relief will not compensate the putative class for lost compensation, the Court is satisfied that the potential numerosity of the putative class is sufficient to make individual joinder of all the members impracticable.

Commonality

Plaintiffs satisfy the commonality requirement of FRCP 23(a)(2). A single common question of law or fact may satisfy this rule. *Monaco*, 187 F.R.D. at 61; *Ansoumana*, 201 F.R.D. at 86. The common question of fact here is whether the plaintiff class members were denied overtime pay. A common question of law

is whether NYS Labor Law was violated by this alleged failure to pay overtime. *See Noble v. 93 Univ. Place Corp.*, 224 F.R.D. 330, 343 (S.D.N.Y. 2004) ("The legal theory set forth in Noble's Complaint is common to all class members--that this alleged failure to pay overtime violates New York's labor law. Accordingly, the commonality requirement is satisfied.").

Defendants argue that an individualized inquiry into each plaintiff's overtime claim is necessary, and that, "[a] conclusion as to one member of the class will not be determinative or even relevant to that of any other member" and therefore there is no commonality. (Defs.' Mem Opp'n Pls.' Mot. Partial Summ. J., hereinafter "Defs.' Mem. Opp'n", at 10.) This is incorrect. Plaintiff class members wages are governed by a common contract clause,[10] and resolution of the issue of whether the wage calculation under this clause included overtime will necessarily determine the relevant wage calculation for all class members. (*See* Defs.' Ex. C, at 9). Therefore, the commonality requirement of FRCP 23(a)(2) is satisfied.

Typicality

[10] There is an issue whether the original defendants' successor in interest was bound by the terms of the collective bargaining agreement. (*See* Defs.' Mem. Opp'n at 19-20.) Should the original defendants' successor in interest not be bound by the collective bargaining agreement, those ambulette drivers not working under the agreement may be split off as a subclass. *See* Fed. R. Civ. P. 23(c)(4) ("a class may be divided into subclasses").

Plaintiffs satisfy the typicality requirement of FRCP 23(a)(3), which requires the claims of the class representatives to be typical of the class. Typicality is satisfied if similar legal arguments are used to prove each class members' claim, and if each class members' claim arises from the same course of events. *Robidoux*, 987 F.2d at 936; *Monaco*, 187 F.R.D. at 62; *Ansoumana*, 201 F.R.D. at 86. Here, the class representatives are alleging that they were not paid overtime in violation of NYS Labor law. The same legal and factual claims are being made for each individual class member. Therefore, the typicality requirement is satisfied.[11]

Adequacy of Representation

The plaintiffs satisfy the requirements of FRCP 23(a)(4), which requires that "the representative parties will fairly and adequately protect the interests of the class. The adequacy inquiry has two parts: (1) Class counsel must be "'qualified, experienced and generally able to conduct the litigation'", *Marisol*, 126 F.3d at 378 (quoting *In re Drexel Burnham Lambert*, 960 F.2d 285, 291 (2d Cir. 1992)); and (2) "Plaintiffs must also demonstrate that there is no conflict of interest between the named plaintiffs and other members of the

[11] Defendants argue that typicality is not met because helpers and mechanics performed different tasks than ambulette drivers. (Defs.' Mem. Opp'n at 12.) Because the putative class will only include ambulette drivers, this argument is irrelevant.

plaintiff class." *Id.*

Defendants challenge the qualifications of plaintiffs' counsel by citing the allegedly poor quality of plaintiffs' counsels' work and their alleged lack of experience. (*See, e.g.,* Defs. Reply Mem. Further Opp'n at 11-13.) Although the Ennis Report, upon which Defendants mainly rely to bolster their claim that Plaintiffs' counsel is not qualified, leaves something to be desired in terms of clarity, the Ennis Report does not demonstrate the inadequacy of plaintiffs' counsel. The Ennis Report is not the only submission from the plaintiffs, and the Court is satisfied that plaintiffs' counsel is qualified on the basis of the competency demonstrated in the Plaintiffs' pleadings and other submissions to this Court. *See In re Frontier Ins. Group, Inc. Securities Litigation*, 172 F.R.D. 31, 44 (E.D.N.Y 1997) (Nickerson, J.) (stating that a court looks beyond reputation and to present competence in determining qualifications of counsel). Nor does this Court find there to be any serious question as to Plaintiffs' Counsel experience to try this case. Plaintiffs' counsel Mr. Barry I. Levy has satisfactorily demonstrated to this court that he and co-counsel Mr. Kandel have the requisite experience to try this case. (*See* Decl. of Barry I. Levy ¶ 3 (discussing experience of Mr. Levy and Mr. Kandel); Pls.' Mem. Further Supp. at 8 n.5 (noting that Mr.

Levy has argued more than fifty cases in the Second Circuit).)

Defendants also argue that plaintiffs have not shown "that they have the financial resources to represent a class." (Defs.' Mem. Opp'n at 16-17.) As a general rule however, the financial resources of a putative class representative should not preclude the representative from litigating for the putative class. *See, e.g.*, *Rode v. Emery Air Freight Corp.,* 76 F.R.D. 229, 230 (W.D. Pa. 1977) ("One of the major advantages of the class action suit was intended to be the increased accessibility to the judicial system for individuals of all income levels."). Courts have, however, found a class representatives financial resources to be a relevant factor in determining the adequacy of class representation when the ability of the class representative to finance notice to large, nationwide classes is questionable, as was the case in all of the cases defendants cite to support their argument. *Id*.(seeking class certification for a nationwide class of female employees allegedly discriminated against by defendant); *Apanewicz v. General Motors Corp*., 80 F.R.D. 672, 675 (E.D. Pa. 1978) (seeking class certification for a class of "all independent body shops in the United States . . . who engage in the repair of automobile and truck bodies and parts thereof who purchase crash parts"); *Ralston v. Volkswagenwerk, A. G.,* 61 F.R.D. 427, 429 (W.D. Mo. 1973) (seeking class certification for

all Volkswagen purchasers nationwide who purchased from authorized Volkswagen dealers); *P.D.Q., Inc. v. Nissan Motor Corp.,* 61 F.R.D. 372, 374 (S.D. Fla. 1973) (seeking class certification for nationwide class of Datsun purchasers purportedly numbering over 630,000). The class at issue here numbers approximately fifty-four persons who work in the New York metropolitan area. Therefore, the cases defendants cite are not on point. Furthermore, Plaintiffs' counsel are offering their services in the hopes of recovering costs and attorneys' fees from the defendants. (*See* Pls.' Mem. Further Supp. at 7-8.)[12] Accordingly, the Court is satisfied that the financial resources of the plaintiffs will not affect the adequacy of representation.

Rule 23(b)(3)

In order to satisfy the requirements of FRCP 23(b)(3) plaintiffs must demonstrate that common questions of law or fact predominate over questions affecting only individual members, and that a class action "is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). The subsection lists four non-exclusive factors to be considered:

[12] In New York State, although an attorney may execute a contingency contract with a client, a client is ultimately liable for the expenses (as opposed to fees) incurred in litigation. N.Y. Comp. Codes R. & Regs. 22 § 1200.22 (2005).

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Id.

Predominance

The Court finds that common questions of law and fact predominate over individualized questions. In order to meet the predominance requirement the plaintiff must establish that issues of general proof predominate over issues of individualized proof. *In Re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 136 (2d Cir. 2001). The predominant common questions in this class action are whether defendants failed to pay their ambulette drivers overtime wages and whether this alleged failure violated NYS Labor Law. *See generally*, *Noble*, 224 F.R.D. at 345 (finding FRCP 23(b)(3) predominance of common questions for pendent NYS Labor law claim because "the gravamen of the claim is that defendants engaged in a course of conduct that deprived employees of their right to overtime pay."); *Ansoumana*, 201 F.R.D. at 89 ("[A] single issue predominates . . . because each proposed Plaintiff class member did substantially the same type of work,

for the same type of employer, and was assigned in the same sort of way, during the relevant time period."). The general proof required is that which demonstrates the proper method of wage calculation for all ambulette drivers; indeed, the individualized inquiry as to what, if any, overtime wages are owed is only possible once the proper general wage calculation for all ambulette drivers is determined.[13] Therefore, the Court finds that a common question of fact, and a common question of law, predominate over any individualized questions.

Superiority

The Court further finds that the class action form is superior to alternative methods of adjudicating this controversy. The class members in this case have no strong interest in individually controlling the litigation because it is unlikely a class member would bring individual litigation because the cost of an individual lawsuit likely would exceed any overtime wage recovery. *See Noble*, 224 F.R.D. at 346 (holding a FRCP 23(b)(3) class action superior to alternative methods of adjudication because of the negative value claims of the class members).

[13] Because defendants argue that the successors in interest to the original collective bargaining agreement are not bound by that agreement, it is possible that there will be two wage calculations for each subclass of ambulette drivers; those that are governed by the collective bargaining agreement, and those that are not. (*See* Defs.' Mem. Opp'n at 19-20.) The Court makes no determination at this time as to whether the collective bargaining agreement applies to the successors in interest of the original defendants.

Defendants maintain that individual joinder or "referring the plaintiffs to the grievance machinery in the collective bargaining agreement between the Union and the defendant E&L" are superior methods of adjudication to a class action in this instance. (*See* Defs. Mem. Opp'n at 18.) The class action in question, however, is a state claim pendent on a nearly identical Federal claim, and thus judicial and party economy are served by trying both these claims in one forum. Duplicative presentations of proof and rebuttal in different forums under different rules will not be required. Finally, the action in question is a straightforward one presenting no difficult case management issues greater than those posed by the collective FLSA action. *See Ansoumana*, 201 F.R.D at 89 ("the difficulties likely to be encountered in the management of the [pendent NYS Labor Law] class portion of this action are not likely to be different or greater than in the management of the [FLSA] portion of this action.") Therefore, the class action form is the superior method of adjudication for the common questions of law and fact at issue here.

Appointment of Class Counsel

Pursuant to FRCP 23(g), the Court appoints as Plaintiffs' class counsel Barry I. Levy and Elan R. Kandel. The Court is satisfied that they meet the requirements of FRCP

23(g)(1)(C). *See* Adequacy of Representation discussion *supra* pp. 12-15.

Liquidated Damages

Defendants argue that class certification should be denied because Plaintiffs have not waived their liquidated damages claims for their NYS Labor Law claim, and NYS Labor Law does not permit class actions claiming liquidated damages unless expressly provided for by the statute giving rise to the cause of action. *See* N.Y. C.P.L.R. § 901(b) (2004); (Defs.' Reply Mem. Further Opp'n at 13-14.) The NYS Labor Law in question here does not do so. *See* N.Y. Lab. Law § 663.

New York law does, however, allow for the waiver of liquidated damages claims for class action claims for overtime wages as long as putative class members are given the opportunity to opt out of the class in order to pursue their own liquidated damages claims. *See Ansoumana*, 201 F.R.D. at 95 (citing *Pensantez v. Boyle Envtl. Servs., Inc.*, 673 N.Y.S. 2d 659, 660 (1st Dep. 1998)). Thus, the Court grants the class certification for the class of ambulette drivers allegedly not paid overtime wages, who worked and/or are working for defendants, from six years prior to the filing of the NYS Law Claim to the present, on the condition that Plaintiffs, in their notices sent to putative class members under FRCP 23(c)(2)(B), include a clear and concise

statement that failure to opt out of the class constitutes a waiver of any claims for liquidated damages under NYS Labor Law § 663. Plaintiffs are directed to provide a clear and concise description explaining the nature of liquidated damages and the consequences of a waiver in the notice as well.

Tyrone Ladson's Untimely FLSA Opt In Notice

The Court grants Plaintiffs' request to allow Tyrone Ladson to opt-in to the FLSA action despite his untimely opt-in notice. This Court has broad powers to add or drop parties at any stage of litigation. Fed. R. Civ. P. 21 ("Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just."); *see Soler v. G & U Inc.*, 86 F.R.D. 524, 527-28 (S.D.N.Y. 1980) (allowing additional workers to join a FLSA claim after original plaintiffs filed an amended complaint). Therefore, Tyrone Ladson is joined to the FLSA action despite his untimely notice.[14]

[14] Defendants claim that the FLSA opt-in notices of Jeffrey Ferguson and Clifford Jean Pierre, along with "seven or eight other notices, were not served on defendants and were not recorded in the docket sheet as received by the Court." (Letter from Hopkins to Court of 10/28/04.) There appears to have been a filing error on the ECF docket in relation to Mr. Ferguson's and Mr. Pierre's opt-in notices. Docket entry number 42 states that Mr. Ferguson's and Mr. Pierre's opt-in notices are attached, but they are not. Plaintiffs' counsel has pointed out this error to the Court and provided copies of Mr. Ferguson's and Mr. Pierre's opt in notices, and the Court finds that

Conclusion

For the reasons discussed above, Plaintiffs motion for class certification is granted, contingent on the waiver of any liquidated damages claims under NYS Labor Law, as is Plaintiffs' motion to add Tyrone Ladson as an additional FLSA plaintiff despite his untimely opt-in notice.

The Clerk is directed to furnish a filed copy of the within to all parties and to the magistrate judge.

SO ORDERED.

Dated : Brooklyn, New York

June 29, 2005

/s/Charles P. Sifton (electronically signed)
United States District Judge

---

they are timely. (*See Letter from Kandel to Court* of 10/22/04 at 2.) Even if they were not, this Court could join them as parties under FRCP 21. Finally, as to the "seven or eight other notices," the Court has not included in its count of FLSA opt-in plaintiffs any records outside those recorded in the docket.